

ORIGINAL

LAW OFFICES

KELLER AND HECKMAN LLP

1001 G STREET, N.W.
SUITE 500 WEST
WASHINGTON, D.C. 20001
TELEPHONE (202) 434-4100
FACSIMILE (202) 434-4646
—
BOULEVARD LOUIS SCHMIDT 87
B-1040 BRUSSELS
TELEPHONE 32(2) 732 52 80
FACSIMILE 32(2) 732 53 92

JOSEPH E. KELLER (1907-1994)
JEROME H. HECKMAN
WILLIAM H. BORGHESANI, JR.
MALCOLM D. MACARTHUR
WAYNE V. BLACK
TERRENCE D. JONES
MARTIN W. BERGOVICI
JOHN S. ELDRED
RICHARD J. LEIGHTON
ALFRED S. REGNIERY
WILLIAM L. KOVACS
DOUGLAS J. BEHR
RAYMOND A. KOWALSKI*
SHIRLEY A. COFFIELD
MICHAEL F. MORRONE
JOHN S. RICHARDS
JEAN SAVIGNY*
JOHN B. DUBECK
PETER L. DE LA CRUZ
MELVIN S. PROZEN
LAWRENCE P. HALPRIN
RALPH A. SIMMONS
RICHARD F. MANN
C. DOUGLAS JARRETT
SHEILA A. MILLAR
GEORGE G. MISKO
STEPHAN E. BECKER
GAREN E. DODGE
PATRICK J. HURD
MARK A. SIEVERS
JEAN-PHILIPPE MONTFORT*
DAVID G. SARVADI
JONATHAN R. SPENCER
CATHERINE R. NIELSEN
SUSAN M. HAFELI*
AMY N. RODGERS
ELLIOT BELLOS
MARK L. ITZKOFF
ROSEMARIE A. KELLEY
BRIAN T. ASHBY
T. PHILLIPS BECK
ARTHUR S. GARRETT III
LESLIE E. SILVERMAN
ELIZABETH N. HARRISON
ROBERT H. G. LOCKWOOD
CAROL MOORS TOTM

JOAN C. SYLVAIN
MARTHA E. MARRAPESE
DONALD T. WURTH
DAVID S. BERRY
NICOLE S. DONATH
S. DESORAH ROSEN
DAVID R. JOY
FREDERICK A. STEARNS
TONY RUSSELL EPPS
THOMAS C. BERGER
JOHN F. FOLEY
ALEXANDRE HENCIK von ZEBINSKY*
PHILIP H. ANDREWS*
JENNIFER A. BONANNO*
JOHN REARDON
PATRICK W. RATKOWSKI*
MARA A. MICHAELS*
PAULA DEZA*
JOHNS W. HOPKINS, JR.*
SUSAN L. CHENAULT*
JOHN B. O'LOUGHLIN, JR.*

*NOT ADMITTED IN D.C.
*RESIDENT BRUSSELS

SCIENTIFIC STAFF

DANIEL S. DIXLER, Ph. D.
CHARLES V. BREDER, Ph. D.
ROBERT A. MATHEWS, Ph. D., D.A.B.T.
JOHN P. MODDERMAN, Ph. D.
HOLLY HUTMIRE FOLEY
JUSTIN C. POWELL, Ph. D.
JANETTE HOUK, Ph. D.
LESTER BORODINSKY, Ph. D.
THOMAS C. BROWN*
MICHAEL T. FLOOD, Ph. D.
ANDREW P. JOVANOVIH, Ph. D.
EUGENIA M. BRAZWELL, Ph. D.

TELECOMMUNICATIONS
ENGINEER
RANDALL D. YOUNG

WRITER'S DIRECT DIAL NUMBER
(202) 434-4124
Morrone@khlaw.com

November 25, 1996

RECEIVED

NOV 25 1996

Honorable William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

DOCKET FILE COPY ORIGINAL

Re: RM-8897;
Comments of Moving Phones Partnership, L.P. and
FutureWave General Partners, L.P.

Dear Mr. Caton:

Transmitted herewith, on behalf of Moving Phones Partnership, L.P. and FutureWave General Partners, L.P., are a paper original and four (4) copies of their Comments with respect to the above-referenced rulemaking proposal.

Should the Commission have any questions regarding this submission it is requested to contact the undersigned.

Very truly yours,

Michael F. Morrone

Michael F. Morrone
Counsel for
Moving Phones Partnership, L.P.
and
FutureWave General Partners, L.P.

cc: Eric Bash
Charles D. Ferris, Esquire
International Transcription Service, Inc.

No. of Copies rec'd
List ABCDE

0+4
WT

ORIGINAL

BEFORE THE
Interstate Commerce Commission

WASHINGTON, D.C. 20423

RECEIVED

NOV 25 1996

Federal Communications Commission
Office of Secretary

In the Matter of:)
Request of Cellular)
Communications of Puerto) RM-8897
Rico, Inc. to Hold an Auction)
to License Cellular RSA)
No. 727A, Ceiba, Puerto Rico)

To: The Commission

COMMENTS
OF
Moving Phones Partnership, L.P.
and
FutureWave General Partners, L.P.

Moving Phones Partnership, L.P. ("Moving Phones") and FutureWave General Partners, L.P. ("FutureWave")¹ hereinafter collectively referred to as "Commenters," by their attorneys, respectfully submit their Comments in response to the invitation extended by Public Notice of the Federal Communications Commission ("Commission" or "FCC") released October 24, 1996, concerning the Petition for Declaratory Ruling or, in the Alternative, for Rulemaking ("Petition") filed in the above-

¹ Moving Phones and FutureWave were originally organized as general partnerships prior to filing cellular applications for various RSA markets including the Ceiba, Puerto Rico Rural Service Area ("RSA"). Subsequent to those filings, Moving Phones and FutureWave converted to limited partnership structures.

styled matter by Cellular Communications of Puerto Rico, Inc. ("CCPR" or "Petitioner").²

I. IDENTIFICATION OF COMMENTERS

1. Moving Phones and FutureWave each filed cellular Frequency Block A applications for over 400 RSAs, inclusive of the six RSA markets originally scheduled for relottery on September 18, 1996.³

II. COMMENTS

2. Moving Phones and FutureWave oppose Petitioner's request that the Commission auction, rather than relottery, cellular RSA licenses for which applications were filed prior to July 26, 1993. Specifically, Commenters support the Commission's announcement of July 12, 1996 to conduct relotteries for the purpose of awarding Frequency Block A cellular licenses in the Polk, Arkansas, Monroe, Goodhue, Minnesota, Florida, Barnes, North Dakota, Bradford, Pennsylvania, and Ceiba, Puerto Rico RSAs each constituting a market in which the original tentative

² Pursuant to FCC Public Notice (DA 96-1685), the Commission has elected to treat CCPR's Petition for Declaratory Ruling as a Petition for Rulemaking and to solicit public comment thereon.

³ Lottery Notice, FCC To Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which Previous Winner was Defective (July 12, 1996) (lottery to be held for Frequency Block A authorizations in the Polk, AR, Monroe, FL, Goodhue, MN, Barnes, ND, Bradford, PA and Ceiba, PR RSAs.

selectee's application was found to be defective and was dismissed.

3. In 1993, Congress enacted legislation that explicitly authorized the Commission to conduct auctions to choose between or among two or more mutually exclusive applications for initial licenses.⁴ Notably, this legislation prohibited the Commission from using lottery procedures to award any license after August 10, 1993, unless the Commission determined that the license was not to provide subscription-based service or that applications for such licence were accepted for filing before July 26, 1993. The Commission concluded that Section 6002(e) of the Budget Act afforded the FCC the requisite discretion either to lottery or auction licenses filed for prior to that date. On three separate occasions, the Commission has exercised this discretion and has held that lotteries are the most appropriate way to bestow licenses among pre-July 26, 1993 applicants. Indeed, the Commission's treatment of pre-July 26, 1993 Interactive Video and Data Service ("IVDS") applications set the stage for its principled treatment of other applications filed before this date. Specifically, in its Notice of Proposed Rulemaking (PP Docket No. 93-253), the Commission held that the legislative history of Section 309(j) revealed Congress' desire to treat IVDS applications filed before July 26, 1993 as exempt from

⁴ Omnibus Budget Reconciliation Act 1993 ("Budget Act"), Pub. L. No. 103-66, 107 Stat. 312 (1993) (Addition of new Section 309(j) to the Communications Act.)

competitive bidding procedures.⁵ So certain was the Commission of this interpretation that on September 15, 1993, almost a full month before inviting comments on competitive bidding rules, the FCC lotteried those first nine IVDS markets for which it had accepted applications prior to July 26, 1993. Such action exemplifies the Commission's commitment to deal equitably with applications filed prior to that date. Since then, the Commission has on two other occasions held that lotteries were the most appropriate way of dealing with pre-July 26, 1993 applications.

4. In Memorandum and Opinion Order (PP Docket No. 93-253) the Commission determined that lotteries were the most appropriate way to award licenses for cellular unserved areas for which applications had been filed before July 26, 1993.⁶ There, the Commission concluded that:

1) the Congressional intent would best be observed by using the statutory lottery procedures for the unserved area applications filed prior to July 26, 1993;

2) holding auctions would be unfair to applicants who had relied in good faith upon then-existing lottery procedures; and

⁵ In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding (PP Docket No. 93-253), Notice of Proposed Rule Making, FCC 93-455, released October 12, 1993.

⁶ In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Memorandum and Opinion Order, FCC 94-123, released July 14, 1994.

3) instituting an entirely new application process for the auctioning of the unserved areas would impose significant costs on the applicants as well as the government.⁷

5. Additionally, on June 30, 1995, these same well-reasoned arguments were once again raised with regard to Multipoint Distribution Service ("MDS") applications filed prior to July 26, 1993. In reaching its holding, the Commission declared that its decision to lottery the pre-July 26, 1993 MDS applications was "consistent with the statute, [its] tentative conclusion in the Competitive Bidding Notice, and Commission precedent."⁸ In support of its conclusion, the FCC relied upon the following considerations:

1) substantial resources would be saved by conducting lotteries for the relatively few remaining MDS markets in question;

2) given the considerably lengthy delay, it would be unfair to require applicants to refile their applications and participate in an auction; and

3) applicants had expended substantial amounts of time and money preparing the applications.⁹

⁷ Id.

⁸ In the Matter of Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Fixed Service and Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253 - Competitive Bidding, MM Docket No. 94-131, Report and Order, FCC 95-230, released June 30, 1995. ¶ 88.

⁹ Id. at ¶ 89.

The Commission summarized its decision by stating that "it would be inequitable and administratively burdensome to require applicants for MDS station licenses, who filed their applications over four years ago in reliance upon the lottery procedures then in effect, to participate in an MDS auction."¹⁰ By the same token, Moving Phones and FutureWave respectfully submit that subjecting the identified six RSAs to auction would be just as inequitable as it would have been to auction the MDS, IVDS or cellular unserved area licenses for which applications were filed prior to July 26, 1993.

6. In its Petition, CCPR stated that "to this date, the Commission has addressed this [competitive bidding versus lottery] issue only in connection with applications filed for unserved areas."¹¹ CCPR's petition was filed on September 9, 1996, over a year after the release of the Commission's Report and Order holding that lotteries were the most equitable means of choosing among MDS applications filed before July 26, 1993. Nonetheless, CCPR conveniently neglects that fact and thereby creates the misconception that the MDS Report and Order does not exist. Instead of addressing the merits of the Commission's MDS Report and Order, CCPR focuses exclusively on the cellular Unserved Areas Order and states that it is "by its terms . . .

¹⁰ Id. at ¶ 90.

¹¹ Petition at 3.

limited to unserved areas . . ."¹² Interestingly, the Commission itself borrowed heavily from the same cellular Unserved Areas Order in reaching its decision to subject pre-July 26, 1993 MDS applications to lottery. The Commission's use of the cellular Unserved Areas Order as precedent in the MDS decision clearly underscores that its discretion to lottery licenses is by no means restricted to cellular unserved areas.

7. The precedent that has developed with regard to subjecting pre-July 26, 1993 applications to lottery, rather than competitive bidding procedures, is a sound one. As the Commission has already pointed out on several occasions, lotteries are the most equitable way to deal with this group of applicants. These parties have expended considerable sums of money to participate in this process and have had their applications pending for a considerable number of years. To now deprive those applicants of the opportunity to participate in relotteries for which they have long awaited and of which they had a reasonable, justifiable expectation, would be patently unfair. Such policy change on the Commission's part would undoubtedly send a negative message to members of the telecommunications industry who rely on the FCC to provide consistent and predictable licensing procedures. These applicants have waited nearly nine years for licensing resolution

¹² Id. at 4.

of the affected RSAs. During this protracted delay, they have been denied the use of the dollars they were encouraged to invest in the cellular radio lottery process. The only just way of dealing with this situation is to proceed with the lottery.

8. Additionally, if auctions were imposed, significant administrative resources and time would be ill-spent. Thousands of applications and filing fees would have to be returned, thereby imposing a significant burden on the Commission. While filing fees would be recouped by such applicants, any interest or dividends which such investment dollars could have earned had they been committed to ventures other than cellular radio RSA applications would certainly not be paid those applicants by the Commission in the event of a return of their applications. Holding lotteries for these remaining licenses would, therefore, be the least administratively expensive and most equitable way to deal with these applications.

9. Lastly, a close look at CCPR's Petition reveals the self-interest that has motivated its filing. The interim operator in Market No. 727A, Puerto Rico RSA 5 - Ceiba ("Puerto Rico 5") is CCI PR RSA, Inc. ("CCI"), an affiliate of the very entity that has petitioned the Commission to forego relottery the license for that market. CCI's application for interim operating authority readily disclosed that "neither [it] nor any other entity under common ownership or control ha[d] pending an

application for permanent authority with regard to Ceiba."¹³

Without having filed an application to participate in the first lottery for the Ceiba market, neither CCPR nor CCI are now eligible to participate in a relottery for that region. Recognizing this, the self-serving nature of CCPR's Petition becomes quite transparent. The only way for CCPR to obtain permanent authority to operate in Puerto Rico 5 would be to acquire the license through competitive bidding. CCPR has fashioned its Petition in the form of an appeal on behalf of the public interest. In reality, the Petition is merely a means to unfairly increase CCPR's own chances of obtaining the Puerto Rico 5 market, but at the expense of hundreds of initial applicants.

10. In CCPR's Application for Interim Operating Authority it "disclaim[ed] any intent to obtain through the requested interim operating authority any standing to petition or otherwise protest the grant of any application for permanent authority in Ceiba."¹⁴ CCPR's Petition is, in essence, a protest of the means by which the Commission will grant permanent authority in Puerto Rico 5. CCPR should be precluded from doing indirectly what it expressly warranted it would not do directly. CCPR should be bound by the representations it made in its Application for

¹³ CCPR Application for New Common Carrier Radio Station Authorization on FCC Form 401 seeking Interim Operating Authority in Market No. 727A, Puerto Rico RSA 5 - Ceiba. Exhibit #1 at 3. (October 18, 1991).

¹⁴ Id.

Interim Operating Authority, as well as the conditions imposed by the Commission on all interim operators.¹⁵

WHEREFORE, the premises considered, Commenters respectfully reiterate their request that the Commission refrain from adopting rules that would subject to competitive bidding procedures, rather than lotteries, cellular RSA markets for which applications had been filed before July 26, 1993.

Respectfully submitted,

MOVING PHONES PARTNERSHIP, L.P.

FUTUREWAVE GENERAL PARTNERS, L.P.

By:


Michael F. Morrone

By:


Tashir J. Lee

Its Attorneys
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 - W
Washington, D.C. 20001
(202) 434-4100

November 25, 1996

¹⁵ See File No. 02672-CL-CP-92 (Puerto Rico RSA 5 - Ceiba) ("The authorization is granted only to permit interim operations within the specified market until a permanent authorization is granted and the permittee is ready to begin providing service to the public")

CERTIFICATE OF SERVICE

I, Toni Smith, a secretary in the law offices of Keller and Heckman LLP, hereby certify that on this 25th day of November, 1996, a copy of the foregoing Comments was served by first class mail, postage pre-paid, on the following:

Eric Bash
Federal Communications Commission
Wireless Telecommunications Bureau
Commercial Wireless Division, Legal Branch
2025 M Street, N.W., Room 7130
Washington, D.C. 20554

Charles D. Ferris
Sara F. Seidman
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004

International Transcription Service, Inc.
2100 M Street, N.W.
Room 140
Washington, D.C. 20554

A handwritten signature in cursive script that reads "Toni Smith". The signature is written in dark ink and is positioned above the printed name.

Toni Smith